IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STARLA MARY MILLER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12741 Trial Court No. 1JU-13-554 CI MEMORANDUM OPINION No. 6757 — January 23, 2019

Appeal from the Superior Court, First Judicial District, Juneau, Philip M. Pallenberg, Judge.

Appearances: Owen Shortell, Law Office of Owen Shortell, Anchorage, for the Appellant. RuthAnne B. Bergt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg, Judges.

Judge WOLLENBERG.

Following a jury trial, Starla Mary Miller was convicted of one count of second-degree sexual abuse of a minor for paying her nine-year-old daughter to suck on her breast.[1] Miller's trial attorney filed a notice of appeal alleging four errors — two

[1] AS 11.41.436(a)(3).

points related to the trial court's denial of Miller's pretrial motion to dismiss, and two points related to Miller's sentence. Miller's appellate attorney ultimately briefed only the sentencing claims; the attorney did not challenge the denial of the motion to dismiss or otherwise challenge Miller's conviction. With one exception, we affirmed Miller's sentence.[2]

Miller timely filed an application for post-conviction relief. In her application (as ultimately amended by counsel), Miller argued, in part, that her appellate attorney was ineffective for failing to challenge the trial court's denial of her motion to dismiss. After ordering additional briefing on the merits of the issues underlying the motion to dismiss, the superior court rejected Miller's claim against her appellate attorney. The superior court concluded that there was no reasonable possibility that the underlying legal arguments would have succeeded on appeal and, as a result, Miller had failed to establish that she had received ineffective assistance from her appellate counsel. Having already rejected Miller's remaining claims, the court dismissed Miller's post-conviction relief application in its entirety.

Miller now appeals, challenging the dismissal of her post-conviction relief claim against her appellate counsel. But Miller does not contest the superior court's ruling that her underlying legal claims lack merit. She has therefore forfeited any argument that her appellate counsel was incompetent for failing to pursue those claims.

Instead, Miller argues for the first time on appeal that when a criminal defendant chooses to appeal her conviction, the defendant's appellate attorney has no authority to unilaterally decide to file only a sentence appeal, and to forgo a merit appeal (*i.e.*, forgo any challenge to the validity of the defendant's conviction). Miller contends

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[2] *Miller v. State*, 2013 WL 1789425 (Alaska App. Apr. 24, 2013) (unpublished) (directing the superior court to amend the judgment to reflect a 10-year term of probation).

that this course of conduct violates the attorney's duty of loyalty to a client, that it is ineffective assistance of counsel per se, and that it is structural error — *i.e.*, the defendant is entitled to relief without any showing of prejudice.

In *Coffman v. State*, this Court held that an attorney has the discretion to omit an excessive sentence claim when the attorney pursues an appeal that attacks the validity of the defendant's conviction.[3] But there is a good argument that an attorney does not have the same discretion in the converse situation — instances where the attorney decides to omit any challenge to the defendant's conviction, and instead pursues only a sentencing claim.

One of the fundamental decisions that must be personally made by a criminal defendant is whether to exercise the right to attack the conviction on appeal.[4] As applied to defendants who exercise their right to have the State prove its case at trial, this right to decide whether to appeal would seemingly be hollow without the corresponding right to insist that the attorney's appellate brief actually include one or more claims challenging the validity of the defendant's conviction.

But even though Miller makes this argument on appeal, she never raised this argument when she litigated her application for post-conviction relief in the superior court. In fact, during the post-conviction relief proceedings, the superior court expressly noted that Miller was not raising this issue — and the court therefore declined to address it.

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[3] *Coffman v. State*, 172 P.3d 804, 810-12 (Alaska App. 2007).

[4] Alaska R. Prof. Conduct 1.2(a); *see also* AS 22.07.020(d) ("An appeal to the court of appeals is a matter of right in all actions and proceedings within its jurisdiction[.]"); *cf. Stone v. State*, 255 P.3d 979, 983 (Alaska 2011) (holding that court-appointed counsel must file a petition for sentence review if the client demands it, since "[a]n attorney who refuses to file a petition for [sentence] review at the client's request essentially denies that client the assistance of counsel for the client's first-tier appellate procedure").

Because this issue was never raised in the superior court, the record contains no evidence pertaining to the conversations that Miller may have had with her appellate attorney regarding the choice of claims to be pursued on appeal.

With regard to the evaluation of potential "merit" claims — *i.e.*, potential attacks on Miller's conviction — the only pertinent information is contained in the affidavit filed by Miller's appellate attorney. In that affidavit, Miller's attorney explained that he reviewed and researched the arguments underlying Miller's pretrial motion to dismiss, and he concluded that these arguments had no merit. In other words, the attorney concluded that it would be pointless to attack the trial judge's ruling on Miller's pretrial motion to dismiss.

The attorney's affidavit does not address whether he discussed these matters with Miller — and, if so, whether Miller concurred in his choice of issues to be pursued on appeal. Similarly, Miller's affidavit does not describe her conversations with her appellate attorney about the issues to be pursued on appeal. In fact, when Miller litigated her application for post-conviction relief, she did not discuss in her affidavit her appellate attorney's performance at all. All of Miller's assertions in her affidavit focused on concerns about her *trial attorney's* performance. Because of this, the record contains no indication that Miller's appellate attorney unilaterally chose to forgo all challenges to Miller's conviction without consulting Miller.

Thus, even if an appellate attorney might be obligated under Alaska law to attack a defendant's conviction (as opposed to simply the defendant's sentence) if the defendant so desires, Miller never raised this claim in the superior court, and she never presented any evidence to support the conclusion that her appellate attorney violated this standard in her case. For these reasons, we conclude that Miller failed to preserve this claim for appeal.

Miller raises one additional point: she argues that the superior court failed to address her claim that her appellate attorney should have provided a more comprehensive affidavit. But Miller never asked the court to order her appellate attorney to provide a more comprehensive affidavit, nor did she assert that her attorney was unwilling to provide additional information upon request, or that court intervention was necessary.[5] Miller's appellate attorney provided a five-page affidavit explaining his decision-making in this case. If Miller felt that she needed additional information to support her application for post-conviction relief, it was her burden to ask her attorney to supplement his affidavit, or to show that her attorney was unwilling to do so.[6]

Conclusion

The judgment of the superior court is AFFIRMED.

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[5] *Cf. Harmon v. State*, 2016 WL 191989, at *5-6 (Alaska App. Jan. 13, 2016) (unpublished) (holding that, where the post-conviction relief petitioner's trial attorneys refused to provide affidavits and post-conviction relief counsel asked the trial court to hold an evidentiary hearing to require the trial attorneys to respond to the claims, the court erred in not ordering a hearing or taking other steps to assist the petitioner in developing the record).

[6] *Steffensen v. State*, 837 P.2d 1123, 1126-27 (Alaska App. 1992).